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Supreme Court, U.S.
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In The

Supreme Court of the United States

BASHO ELLIOT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the government can use statements of a defendant obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), in either of the following instances:

(a) To rehabilitate impeached witnesses in the government's case in chief; or

(b) To impeach a defense expert.

2. Whether a defendant has been denied due process when a defense witness refuses to testify at a second trial after being called before a grand jury as a target of a perjury investigation for his testimony at the first trial.

PARTIES TO THE PROCEEDING

The petitioner is BASHO ELLIOT. The respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

The petitioner BASHO ELLIOT petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals dated January 5, 2009 is unpublished and is attached as Appendix A. The Order of the United States Court of Appeals dated February 20, 2009 denying a timely petition for rehearing is attached as Appendix E. The Order of the United States District Court dated February 23, 2007 permitting the government to use statements obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966) is attached as Appendix C. The Order of the United States District Court dated March 2, 2007 denying defendant's motion to dismiss for a due process violation is attached as Appendix D.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment provides:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner and Defendant, Basho Elliot, [hereinafter petitioner] was charged with conspiracy to distribute and to possess with the intent to distribute cocaine, 21 U.S.C. § 846 and § 841(a)(1), and attempted possession with intent to distribute cocaine. 21 U.S.C. § 841(a)(1). Petitioner was convicted of both offenses and was sentenced to 97 months in custody. He appealed his conviction to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed the judgment.

A. Pretrial Motions

1. The *Miranda* Motion And Petitioner's Efforts To Defend The Case By Attacking The Credibility Of The Informant

Prior to trial, petitioner moved to suppress his post arrest statements on the grounds that the statements were made in response to police interrogation prior to advising him of his rights under

Miranda v. Arizona, 384 U.S. 436 (1966). Since the statements were made prior to the reading of his *Miranda* rights, the Government conceded that they could not offer petitioner's statements in their case in chief. (2-23-07 R.T. 7).

Thereafter, petitioner submitted a letter to the Court outlining the petitioner's defense to the charges. The letter advised the Court that petitioner's counsel would be cross examining government agents about their failure to properly investigate the government's informant John Meston, by failing to search his home and failing to investigate his finances. Petitioner's letter also outlined the anticipated expert testimony of defense expert witness Frank Panessa. Panessa was a retired Drug Enforcement Agency Supervising Agent. Petitioner intended to have Panessa testify that the DEA had failed to adequately investigate the informant John Meston because there had been no search conducted of Meston's home and there had been no investigation of Meston's finances. (E.R. 44-45).

The District Court ruled that if defense expert witness Frank Panessa gave expert opinion testimony concerning the DEA's failure to search Meston's home and failure to investigate Meston's finances, such testimony would open the door to allow the Government to use evidence of petitioner's statements obtained in violation of *Miranda* to impeach the defense expert. The Court made a similar ruling on petitioner's anticipated cross examination of police officers. If petitioner brought out evidence on cross examination

that the police officers failed to investigate Meston's finances and failed to thoroughly search Meston's home, the government could rehabilitate these impeached witnesses by using petitioner's statements obtained in violation of *Miranda*. The Court reasoned that the Government should be allowed to use the petitioner's statements obtained in violation of *Miranda* to establish that the reason the police did not conduct a further investigation of John Meston was because petitioner had confessed to the crime and further investigation was unnecessary.[1] (2-23-07 R.T. 24-27). Appendix C, p.17-19.

2. The Due Process Motion And Defense Witness Frankie Vargas

Petitioner also moved to dismiss the case on the grounds that the government's threats of a perjury prosecution against defense witness Frankie Vargas had caused Vargas to refuse to testify. Petitioner claimed this violated due process under *Webb v. Texas*, 409 U.S. 95 (1972). (1 R.T. 7-9; 4 R.T. 185-187). Frankie Vargas testified as a defense witness at petitioner's first trial which ended in a mistrial.

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[1] Petitioner's statements obtained in violation of *Miranda* were that he could not cooperate with the officers by telephoning the source of the drugs because he and his family would be killed. He also said that this was his deal, that he would take responsibility for the drugs, and his wife knew nothing about the drugs. (E.R. 41-42). These statements were never offered into evidence and only appear in a police report attached to petitioner's motion to suppress.

There was a two and a half year delay between the first trial and the second trial. During that two and half year period of delay, the government subpoenaed Frankie Vargas before the grand jury advising him that he was a target of a perjury investigation. (3-23-07 R.T. 39; E.R. 59-61).

Vargas was questioned before the grand jury concerning the nature of his trial testimony at the first trial and what he knew about the other witnesses and petitioner's trial counsel Richard Gordon. Vargas asserted the Fifth Amendment before the grand jury and refused to answer any questions. (E.R. 59-61). Before the start of petitioner's second trial, the government stated on the record that it believed that Frankie Vargas had committed perjury during the first trial. (2-23-07 R.T. 48-51). The District Court appointed counsel to represent Vargas and on the advice of counsel, Vargas asserted his Fifth Amendment privilege and refused to testify at petitioner's second trial. (4 R.T. 181-184). The District Court denied petitioner's motion to dismiss the case. (4 R.T. 188-189). Appendix D, p.23-25.

B. The Government's Case

On May 1, 2003, Frank Herbert, a California State Bureau of Narcotics Enforcement Agent, working at a Federal Express hub in the city of Van Nuys, California, located a suspicious package containing two kilograms of cocaine. It was in the process of being sent from California to Hawaii. The sender,

Marcus Santas, was determined to be a fictitious person with a return address at a Post Master's mail box service on Riverside Drive in Sherman Oaks, California. The package was being sent to Adam Stevens in Lahaina, Hawaii. Agent Herbert decided to make contact with narcotics officers in Hawaii in order to arrange for a controlled delivery of the package containing cocaine. (2 R.T. 4-14).

A monitoring device was placed in the package and on May 6, 2003, an undercover police officer dressed as a FedEx driver delivered the package to 116 Kapunakea Street, the home of Anita Yim and John Meston. The cocaine was replaced with pseudo cocaine before the controlled delivery. (2 R.T. 46-47; 51-53; 4 R.T. 83). Five minutes later, John Meston arrived at the residence. He retrieved the package and drove the package to the residence of petitioner Basho Elliot at 145 Kaniau Road, where he went inside. (2 R.T. 54-55).

Shortly thereafter, several police officers entered the residence. Liane Elliot, petitioner's wife, directed the officers to the back house. The officers then went to a small house on the back of the lot. Inside this small house they found petitioner and John Meston. They also found the small box involved in the controlled delivery of the pseudo cocaine. (2 R.T. 56-59; 6 R.T. 123).

Sirchie powder applied to the pseudo cocaine inside the package was found on the hands of petitioner after his arrest. (3 R.T. 116-117). Officers

searched the residence and found $16,900.00 in cash in a safe. (3 R.T. 121-123). Petitioner's tax returns for the year 2002 indicated that petitioner had a total income of $11,867. (3 R.T. 127-128). In a drawer in the residence, the agents found documents showing that petitioner had purchased an expensive diamond in the year 2002. (3 R.T. 134-135).

Honolulu police detective Tanya Tano testified that after petitioner was arrested she recovered from petitioner's right rear pocket the air bill and label that was on the package. (3 R.T. 58, 62-64). She testified that at some point after petitioner's arrest, he looked down and shook his head and said he was so stupid to do this. (3 R.T. 70).

John Meston testified as a government witness. He pleaded guilty in connection with the case in exchange for the possibility of receiving a lesser sentence. (4 R.T. 141). Meston testified that sometime in 2002, petitioner had asked him to receive a package in exchange for $1,500.00. Meston testified that he received a second, third, and fourth package for petitioner under similar circumstances and petitioner paid him $2,000.00 for each package that he received. (3 R.T. 200-206).

On May 6, 2003, Meston received a fifth package under the same circumstances and after receiving the package he took the package to petitioner's residence. (3 R.T. 206-209). Meston testified that petitioner opened up the package and seemed concerned that something was wrong. Petitioner made a telephone

call to a person named Andy and complained that there was something wrong with the tape on the package. Petitioner then made a second telephone call. At that point, the police entered the residence and arrested Meston and petitioner. (3 R.T. 209-212).

Cellular telephone records of petitioner's cellular phone indicated numerous calls were made to Van Nuys, California. The records showed that calls were made on May 6, 2003 to a telephone number belonging to a woman named Michelle Alvarez. (3 R.T. 154-164; 4 R.T. 149). The phone number is in the 818 area code for Van Nuys, California. (4 R.T. 161-163).

C. The Defense Case

Frankie Vargas asserted his Fifth Amendment privilege and refused to testify. (4 R.T. 181). His former testimony from petitioner's first trial was read to the jury as follows. Frankie Vargas was a long time friend of petitioner. He lived and worked in California and had visited petitioner in Hawaii. In 2003, he borrowed a cell phone from Michelle Alvarez. He received three telephone calls from petitioner on May 6, 2003 while using Michelle Alvarez's cell phone. During the telephone calls, he spoke with petitioner concerning surfing and a surfboard that he was to receive from petitioner at some future time. There was no discussion concerning a package or receiving any drugs. (6 R.T. 9-19).

Michael Elliot, the father of petitioner, testified that after petitioner's mother died, Michael was

living with his friend Barbara Arens. When petitioner had plans to marry, Barbara Arans purchased a diamond ring for petitioner's wife. (6 R.T. 86-90). Michael Elliot frequently gave money to his son. The large amount of cash found in petitioner's residence on the day of the arrest had been given by Michael Elliot to his son in order to fix up the house and to have money for emergencies. (6 R.T. 90-95; 123-125; 129).

Frank Panessa, was formerly employed with the Drug Enforcement Agency. He had extensive training and experience in investigating narcotics cases. (6 R.T. 36-41). Based upon his experience it was his expert opinion that if petitioner had been involved in drug trafficking and had paid a total of $7,500.00 to John Meston, then petitioner would have easily had $60,000.00 on hand. Furthermore, the street distribution of the cocaine involved in this case would have netted a profit of $150,000.00. This was far more than the $16,900.00 found in petitioner's residence. Frank Panessa testified that if petitioner had been involved in drug trafficking Panessa would have expected that a search of his residence would have disclosed cutting material, packaging material, guns, and scales. No such evidence was found in this case. (6 R.T. 55-58).

Frank Panessa also examined real estate documents related to a residence owned by John Meston and his partners who took title to a house. After John Meston's May 6, 2003 arrest in this case, the records indicated that John Meston quitclaimed the property to his partners. In Mr. Panessa's expert opinion, the

transfer of the property by a quitclaim deed to Mr. Meston's partners appeared to be payment for the lost narcotics. (6 R.T. 59-63). There was also evidence that John Meston had purchased a boat for $51,000.00. (4 R.T. 72-73).

Russell Woodward, a Honolulu police detective, was recalled as a defense witness. He testified that when he searched petitioner's home there were no guns found. Petitioner had no money on his person, but John Meston did have money on him. (6 R.T. 79-80). When John Meston was arrested, he told Detective Woodward that this was the first time that he had received a package of drugs. Later Meston admitted that he had lied to the detective. Meston changed his statement and said that he had received FedEx drug shipments on three or four occasions. Still later, Meston changed his story again and said he had received drug packages on five occasions. (6 R.T. 81).

D. The Ninth Circuit Decision

The Ninth Circuit in an unpublished Memorandum decision stated that "Even assuming the district court erred in ruling that the defense expert could be impeached with Elliot's 'un-Mirandized' statements, in violation of *James v. Illinois*, 493 U.S. 307 (1990), any error was harmless beyond a reasonable doubt." Appendix A, p.2. On the Due Process violation issue, the Ninth Circuit stated "On the facts here, the summoning of a potential witness before the grand jury and the appointment of independent counsel to

protect the witness's constitutional rights do not amount to witness intimidation." Appendix A, p.2. The Court of Appeals affirmed the conviction.

REASONS FOR GRANTING THE PETITION

I

STATEMENTS OBTAINED IN VIOLATION OF *MIRANDA* ARE NOT ADMISSIBLE AND MAY NOT BE USED BY THE GOVERNMENT TO REHABILITATE IMPEACHED WITNESSES IN THE GOVERNMENT'S CASE IN CHIEF OR TO IMPEACH A DEFENSE EXPERT

Petitioner was convicted entirely upon the testimony of government informant witness John Meston. Meston had received a package of cocaine at his home. Police followed Meston from his home to where he brought the package to petitioner's home. The police entered petitioner's home and arrested Meston and petitioner in the same room with the package. Meston pleaded guilty and in exchange for a lenient sentence, testified that the package belonged to petitioner.

The entire defense was that John Meston was not a credible witness. Defense counsel cross-examined every prosecution witness in order to establish that Meston lacked credibility and was not telling the truth. The most important part of that defense was the fact that the DEA had failed to properly investigate John Meston before using him as a government

witness against the petitioner. That defense was blocked when the district court barred petitioner from cross examining police officers and offering expert testimony that the DEA investigation was deficient for failing to search Meston's home and failing to conduct a financial investigation of Meston prior to using him as an informant. The district court held that if petitioner offered such evidence, then the government could use statements of the petitioner obtained in violation of *Miranda* to rehabilitate the impeached police officer witnesses and to impeach the defense expert witness.

There is no case that allows statements obtained in violation of *Miranda* to be used to rehabilitate impeached witnesses in the government's case in chief or to impeach a defense expert witness. Statements obtained in violation of *Miranda* are excluded in the government's case in chief because the statements have been obtained in violation of the Fifth Amendment. *Miranda v. Arizona*, 384 U.S. 436 (1996). The only exception is that statements obtained in violation of *Miranda* may be admitted for impeachment purposes if the defendant himself testifies in a contrary manner during the trial. *Harris v. New York*, 401 U.S. 222 (1971).

Recently in *Kansas v. Ventris*, 556 U.S. ___, No. 07-1356 (April 29, 2009) the Court reaffirmed the principle that the government may only use the defendant's unlawfully obtained statements to impeach the defendant's testimony. In *Ventris*, the Court allowed the state to impeach a defendant's trial

testimony with his contradictory statements obtained in violation of his right to counsel under *Massiah v. United States*, 377 U.S. 201 (1964).

It has never been the law that statements obtained in violation of *Miranda* may be used to rehabilitate impeached government witnesses or to impeach a defense expert. *James v. Illinois*, 493 U.S. 307 (1990). In *James*, the Court held that it was error to allow a defense witness to be impeached with evidence of the defendant's post arrest statement that had been previously suppressed. The Court stated that by expanding the impeachment exception to encompass the testimony of all defense witnesses, the trial court had misapplied the limited holding in *Harris v. New York*, 401 U.S. 222 (1971). *Harris* was intended to prevent the defendant *himself* from committing perjury on the witness stand. Applying the *Harris* rationale to other defense witnesses was error because it "would chill some defendants from presenting their best defense – and sometimes any defense at all – through the testimony of others." *James v. Illinois*, *supra*, at 314-315.

There is only one case in which the government was able to impeach an expert witness with statements of the defendant obtained in violation of *Miranda*. In that case, a psychiatrist testified concerning his opinion about the mental state of the defendant which was based upon what the defendant had told him. The government was permitted to introduce contrary statements of the defendant obtained in violation of *Miranda* in order to impeach the psychiatrist's opinion. *Wilkes v. United States*, 631

A.2d 880, 889 (D.C. Cir. 1993). See also, *People v. Trujillo*, 49 P.3d 316, 325 (Col. 2002). [If a defense witness testifies concerning what the defendant told the witness, the defendant's hearsay statements may be impeached with other defendant statements obtained in violation of *Miranda*.]

Petitioner's expert witness, Frank Panessa, did not testify concerning any hearsay statements made by the petitioner. His expert testimony related solely to his evaluation of the DEA investigation of the informant John Meston. He found fault in that investigation because Meston's home was never searched and Meston's finances were never investigated. Panessa was prepared to testify that these deficiencies were violations of DEA policy in evaluating whether an informant was credible and should be used as a government witness. Nothing about Panessa's expert testimony allowed the government to introduce statements taken from the petitioner in violation of *Miranda* in order to impeach Panessa's expert opinion.

The same was true concerning the cross examination of police officer witnesses. The cross examination would focus on the failure of the DEA investigation in this case and would not touch on any statements made by petitioner. In the district court ruling, the court stated "I will allow the defendant to ask the single question, 'Was Mr. Meston's house searched?'" Appendix C, p.19. The Court indicated that the answer to that question could not be used to argue that the DEA investigation of Meston was

deficient. The Court ruled that such an argument and any further cross examination of police officers concerning the DEA's failure to throughly investigate Meston would open the door to the government's use of petitioner's statements obtained in violation of *Miranda*. Appendix C, p.19.

The district court ruling was directly contrary to this Court's decisions in *Harris v. New York*, *supra*, and *James v. Illinois*, *supra*, limiting the government's use of statements obtained in violation of *Miranda* to instances where the defendant himself testifies at trial. That did not happen here. Petitioner did not testify at his trial. Nevertheless, the threat of the Government's use of statements obtained in violation of *Miranda*, effectively prevented petitioner from presenting his defense.

The Ninth Circuit held that assuming the trial court's ruling was error, the error was harmless beyond a reasonable doubt. The error in this case cannot be viewed as harmless beyond a reasonable doubt. The government did not have an overwhelming case of guilt. The entire case was based upon the testimony of John Meston. Meston was the person who had received the package initially at his own home. When he was first arrested, he said that this was the only time he had received a package of drugs. When confronted with shipping records concerning four similar deliveries, he admitted that he had lied and that over time he had received five deliveries. There was evidence that Meston had purchased a boat recently for $51,000. There was also evidence

that after his arrest, he transferred his ownership in a parcel of real property by a quitclaim deed, consistent with his paying others for the lost drugs.

In *Berger v. United States*, 295 U.S. 78, 88-89, (1935) this Court found that prosecutorial misconduct was reversible error in a case where the evidence against the defendant was not strong. The Court stated that the government's case against Berger, "may properly be categorized as weak – depending as it did, upon the testimony of Katz, an accomplice with a long criminal record." *Berger v. United States*, *supra*, at 89.

In petitioner's case, the government's case rested entirely upon the testimony of John Meston. Meston was an admitted drug trafficker who was seeking to shift the blame for his own crime onto petitioner in exchange for a reduced sentence. Prior to his arrest, he had purchased a boat for $51,000. After his arrest, he engaged in a suspicious real estate transfer. He initially lied about how many packages of cocaine he had received and only admitted the truth when shown records of five similar parcels being delivered to his home. Under the standard set forth on the *Berger* case, the harm done to petitioner's defense based on the erroneous *Miranda* ruling cannot be viewed as harmless beyond a reasonable doubt.

II

IT IS A VIOLATION OF DUE PROCESS FOR THE GOVERNMENT TO INTIMIDATE A DEFENSE WITNESS AND CAUSE HIM NOT TO TESTIFY BY CALLING THE WITNESS BEFORE THE GRAND JURY TO INVESTIGATE WHETHER HE COMMITTED PERJURY AT AN EARLIER TRIAL IN THE SAME CASE

The Ninth Circuit decision in this case is in conflict with the Fifth Circuit decision in *United States v. Hammond*, 598 F.2d 1008 (5th Cir. 1979). In petitioner's case, the Ninth Circuit held that "the summoning of a potential [defense] witness before the grand jury and the appointment of independent counsel to protect the witness's constitutional rights do not amount to witness intimidation." Appendix A, p.2. By contrast, the Court in *United States v. Hammond*, *supra*, at 1013 found that subpoenaing defense witnesses before the grand jury shortly before the trial could violate the defendant's right to due process if the government's actions causes the defense witness to be intimidated and to refuse to testify.

In petitioner's case, the government subpoenaed Frankie Vargas, a defense witness, before the grand jury to investigate whether Vargas had committed perjury at the first trial. Although Vargas testified at the first trial, he asserted the Fifth Amendment before the grand jury. (2-23-07 R.T. 39; E.R. 59-61). Before the start of the second trial, the government inquired concerning whether Vargas would testify at the second trial. Government counsel stated in open

court that she believed Vargas had committed perjury at the first trial. (2-23-07 R.T. 52-53).

The Court appointed an attorney for Vargas. Vargas' appointed attorney told the court that Vargas would not testify because he believed that Vargas would be prosecuted for perjury if he testified as a defense witness for petitioner. (3 R.T. 217; 225-226). Thereafter, Vargas appeared in court, asserted his Fifth Amendment privilege, and refused to testify. (4 R.T. 181-184). Petitioner moved to dismiss the case because of a violation of his right to due process based upon the government's actions in causing Vargas to now refuse to testify. The motion was denied. (4 R.T. 185-189). Appendix D, p.23-24.

Frankie Vargas was never actually indicted for perjury. However the threat of such an indictment was enough to scare him away from being a defense witness at petitioner's second trial, after he had testified at petitioner's first trial. The central issue in this case is whether it is proper for the government to subpoena a defense witness before a grand jury prior to the retrial of a case, for the purpose of investigating whether the witness committed perjury at the first trial. Such grand jury investigations are enough to scare away any defense witnesses, especially in cases such as this, where the government's counsel states in court before the start of the second trial that she believes the witness committed perjury at the first trial.

It is a violation of a defendant's constitutional right to due process and to the compulsory process of witnesses for either the court or a prosecutor to intimidate defense witnesses and cause the witnesses to refuse to testify. *Webb v. Texas*, 409 U.S. 95 (1972); *United States v. Vavages*, 151 F.3d 1185 (9th Cir. 1998); *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976). In *Webb*, the trial judge admonished a criminal defendant's only witness, who was himself serving a prison sentence, that if he lied under oath the Court would personally see to it that the witness's case would go to the grand jury and he would be indicted for perjury. The judge further stated that any sentence for perjury would be imposed consecutively. After receiving that admonition, the defense witness refused to testify and the defendant was convicted.

The United States Supreme Court reversed the conviction finding that the judge's comments deprived the defendant of due process under the Fourteenth Amendment. *Webb v. Texas*, *supra*, 409 U.S. at 97-98. The Court stated:

> In light of the great disparity between the posture of the presiding judge and that of a witness in these circumstances, the unnecessarily strong terms used by the judge could well have exerted such duress on the witness' mind as to precluded him from making a free and voluntary choice whether or not to testify.

Webb v. Texas, *supra*, at 98.

Certiorari is appropriate in petitioner's case because the Ninth Circuit decision is in direct conflict with the Fifth Circuit case of *United States v. Hammond*, 598 F.2d 1008, 1012-1014 (5th Cir. 1979). In *Hammond*, the defendant was charged with participating in a scheme to defraud a brokerage house. An undercover FBI agent played a role in the scheme and testified against the defendant. In the defense case, a defense witness, Mr. Parsons, presented testimony that supported the defense of entrapment based on the undercover FBI agent's improper inducement of the defendant to commit the crime.

During a recess, the agent told the witness that if he continued on he would have nothing but trouble in another pending criminal case in which the witness agreed to work with the FBI. After this threat, the witness refused to testify further. The next morning, the witness Parsons and another defense witness who had not yet testified were subpoenaed to appear before the grand jury to testify concerning the conspiracy charged against the defendant. Both Parsons and the other witness refused to testify at all as a result of the FBI agent's comment and the grand jury subpoenas.

In *Hammond*, the Court reversed the defendant's conviction. The Court stated:

> We therefore conclude that this governmental interference deprived the defendant of his due process right to present his witnesses. Because we hold that this due process violation requires reversal, we do not reach the

> question of whether, under the circumstances of this case, the government's issuance of these subpoenas also violated the defendant's due process rights.

United States v. Hammond, *supra*, 598 F.2d at 1013. The FBI Agent's comments to the victim Parsons were sufficient to establish a due process violation and thus it was unnecessary to determine whether the government's issuance of grand jury subpoenas alone would also establish a due process violation.

In petitioner's case, Frankie Vargas was subpoenaed before a grand jury investigating whether Vargas had committed perjury at petitioner's first trial. This occurred before the start of the second trial. He was informed that he was a target of the investigation. This meant that the government was actively attempting to have the grand jury indict Vargas for perjury based upon his testimony at petitioner's first trial. Faced with the grand jury subpoena and the government's statement that they believed Vargas had committed perjury at the first trial, Vargas refused to testify at petitioner's second trial.

Petitioner lost a defense witness through the actions of the prosecutor.[2] A grand jury perjury

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[2] Frankie Vargas' testimony from the first trial was read to the jury in the second trial. However, in *United States v. Hammond*, 598 F.2d 1008, 1004 (5th Cir. 1979) the Court held that reading the testimony of a missing witness does not render the due process violation harmless beyond a reasonable doubt. The Court stated that "live testimony can have more impact than a

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investigation of a defense witness just prior to the witness's scheduled testimony is excessive conduct sufficient to establish a due process violation under *Webb v. Texas, supra*. See also, Annot., *Admonitions Against Perjury Or Threats To Prosecute Potential Defense Witnesses, Inducing Refusal To Testify, As Prejudicial Error*. 88 ALR 4th 388, 436-437. This Court should grant certiorari in this case to insure that in the future, government prosecutors are not allowed to scare away defense witnesses by subpoenaing them before the grand jury to investigate them for perjury, just before they are scheduled to testify as defense witnesses.

CONCLUSION

Based on the foregoing, petitioner urges the Court to grant this petition for writ of certiorari.

Respectfully submitted,

JOSEPH T. VODNOY
JOSEPH F. WALSH
Attorneys for Petitioner
Basho Elliot

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statement read to the jury" and a written statement is no substitute for the live testimony of the missing witness. *Id.* at 1004.

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BASHO ELLIOT, aka Bosch Elliot, Defendant-Appellant.	No. 07-10328 D.C. No. CR-03-00244-SOM MEMORANDUM* (Filed Jan. 5, 2009)

Appeal from the United States District Court
for the District of Hawaii
Susan Oki Mollway, District Judge, Presiding

Argued and Submitted November 19, 2008
Honolulu, Hawaii

Before: SCHROEDER, PAEZ and N.R. SMITH, Circuit Judges.

Basho Elliot appeals his conviction and sentence for (1) conspiracy to distribute and (2) attempt to possess with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. § 846. We have

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. We affirm.

Even assuming the district court erred in ruling that the defense expert could be impeached with Elliot's "un-Mirandized" statements, in violation of *James v. Illinois,* 493 U.S. 307 (1990), any error was harmless beyond a reasonable doubt. The evidentiary ruling did not prevent Elliot from presenting his defense theory to the jury through other testimony and in closing argument. Additionally, the evidence of Elliot's guilt was overwhelming.

Elliot also failed to show witness intimidation or other government misconduct. Therefore, the district court did not err in denying Elliot's motion to dismiss the indictment. The district court did not clearly err in finding that neither the prosecutor nor the judge "employ[ing] coercive or intimidating language or tactics that substantially interfere[d] with [the] defense witness[es'] decision whether to testify." *United States v. Vavages,* 151 F.3d 1185, 1189-90 (9th Cir. 1998). The two defense witnesses asserted Fifth Amendment privilege on the advice of independent counsel. On the facts here, the summoning of a potential witness before the grand jury and the appointment of independent counsel to protect the witness's constitutional rights do not amount to witness intimidation.

On the issue of double jeopardy, this court's prior opinion is the law of the case. *United States v. Elliot,* 463 F.3d 858, 863-68 (9th Cir.), *as amended, cert.*

denied, 127 S.Ct. 568 (2006). We find no circumstances that would allow us to revise our well-reasoned opinion. *See Old Person v. Brown,* 312 F.3d 1036, 1039 (9th Cir. 2002).

It is not impermissible double counting to consider Elliot's obstruction of justice conduct both in imposing a sentencing enhancement and as a basis for denying a discretionary downward departure under the Sentencing Guidelines. "Impermissible double counting 'occurs where one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by the application of another part of the Guidelines.'" *United States v. Speelman,* 431 F.3d 1226, 1233 (9th Cir. 2005) (citation omitted). Double-counting usually occurs where an act is used twice to increase a defendant's sentence, not where, as here, one of the alleged double-countings is a failure to grant a discretionary downward departure. We have no jurisdiction to review a discretionary denial of a downward departure in any event. *See United States v. Linn,* 362 F.3d 1261, 1262 (9th Cir. 2004). Thus, we cannot conclude that there was impermissible double-counting in this case.

Finally, the district court did not abuse its discretion in sentencing Elliot to ninety-seven months imprisonment. The sentence falls at the low end of the Guidelines range, and is reasonable in light of the sentencing factors set forth in 18 U.S.C. § 3553(a). *See United States v. Carty,* 520 F.3d 984, 995-96 (9th Cir. 2008) (en banc). Additionally, the disparity

between Elliot's sentence and that of his co-defendant is reasonable considering Elliot's obstruction of justice enhancement and the co-defendant's cooperation, acceptance of responsibility, and qualification for the safety-valve provision.

AFFIRMED.

APPENDIX B

AO 245B (Rev. 6/05) Criminal Judgment
Attachment Page 1 – Statement of Reasons

DATE: JUNE 26, 2007

DEFENDANT:	BASHO ELLIOT, aka "BOSCH ELLIOT,"
CASE NUMBER:	1:03CR00244-001
Social Security: # [Social Security Number Omitted]	Date of Birth: [Date Of Birth Omitted]
Home address: [Home Address Omitted]	Mailing address: [Home Address Omitted]

District of Hawaii
STATEMENT OF REASONS

I. COURT FINDINGS OF PRESENTENCE INVESTIGATION REPORT

A [ ] The court adopts the presentence report without change

B [✓] The court adopts the presentence investigation report but with these changes:

(Check all that apply and specify court determination, findings or comments, referencing paragraph numbers in the presentence report, if applicable.) (Use page 4 if necessary)

1 [✓] Chapter Two of the U.S.S.G. Manual determinations by court (including

changes to base offense level or specific offense characteristics):

The Court finds that the defendant suborned perjury by allowing the testimony of Sergio Hevia and Frankie Vargas. Their testimony undermined the government evidence and co defendant Meston's testimony, in an attempt to obstruct the administration of justice. Consequently, the two-level increase under USSG 3C1.1 applies. Thus paras. 41, 42, 44 and 46 are amended to reflect an adjusted and total offense level of 30. Paras. 74 and 82 are amended to reflect that, based on a total offense level of 30 and criminal history category I, the advisory guideline range is 97 to 121 months and guideline fine range is $15,000 to $2,000,000.

2 [ ] Chapter Three of the U.S.S.G. Manual adjustment determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):

3 [ ] Chapter Four of the U.S.S.G. Manual determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

4 [ ] Additional Comments or Findings (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions):

C [ ] The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P.32.

II. COURT FINDING ON MANDATORY MINIMUM SENTENCE (Check all that apply.)

A [ ] No count of conviction carries a mandatory minimum sentence

B [✓] Mandatory minimum sentence imposed.

C [ ] One or more counts of conviction alleged in the indictment carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum does not apply base on

[ ] findings of fact in this case

[ ] substantial assistance (18 U.S.C. § 3553(e))

[ ] the statutory safety valve (18 U.S.C. § 3553(f))

III. COURT DETERMINATION OF ADVISORY GUIDELINE RANGE (BEFORE DEPARTURES):

Total Offense Level	30		
Criminal History Category	1		
Imprisonment Range	97	to	121 months
Probation Range	N/A	to	
Supervised Release Range	4	to	5 years
Fine Range $	$15,000	to	$2,000,00

[✓] Fine waived or below the guideline range because of inability to pay

IV. ADVISORY GUIDELINE SENTENCING DETERMINATION (Check only one)

A [ ] The sentence is within an advisory guideline range that is not greater than 24 months, and the court finds no reason to depart

B [✓] The sentence is within an advisory guideline range that is greater than 24 months, and the specific sentence is imposed for these reasons. (Use page 4 if necessary.)

The Court considered the nature and circumstances of the offense and the history and characteristics of the defendant, to include the warranted disparity of his and co defendant Meston's sentence, and concludes that the advisory guideline range is reasonable.

C [ ] The court departs from the advisory guidelines range for reasons authorized

by the sentencing guidelines manual. (Also complete Section V.)

D [ ] The court imposed a sentence outside the advisory sentencing system. (Also complete Section VI.)

V. DEPARTURES AUTHORIZED BY THE ADVISORY SENTENCING GUIDELINES (If applicable.)

A **The sentence imposed departs** (Check only one)

[ ] below the advisory guideline range

[ ] above the advisory guideline range:

B **Departure based on (Check all that apply.):**

1 **Plea Agreement** (Check all that apply and check reason(s) below.):

[ ] 5K1.1 plea agreement based on the defendant's substantial assistance

[ ] 5K3.1 plea agreement base on Early Disposition or "Fast-track" Program

[ ] binding plea agreement for departure accepted by the court

[ ] plea agreement for departure, which the court finds to be reasonable

[ ] plea agreement that states that the government will not oppose a defense departure motion

2 **Motion Not Addressed in a Plea Agreement** (Check all that apply and check the reason(s) below.)

[ ] 5K1.1 government motion based on the defendant's substantial assistance

[ ] 5K3.1 government motion base on Early Disposition or "Fast-track" Program

[ ] government motion for departure

[ ] defense motion for departure to which the government did not object

[ ] defense motion for departure to which the government objected

3 Other

[ ] Other than a plea agreement or motion by the parties for departure (Check reason(s) below):

C Reason(s) for Departure (Check all that apply other than 5K1.1 or 5K3.1.)

[ ] 4A1.3 Criminal History Inadequacy
[ ] 5H1.1 Age
[ ] 5H1.2 Education and Vocational Skills
[ ] 5H1.3 Mental and Emotional Condition
[ ] 5H1.4 Physical Condition
[ ] 5H1.5Employment Record
[ ] 5H1.6 Family Ties and Responsibilities
[ ] 5H1.11 Military Record, Charitable Service, Good Works
[ ] 5K2.0 Aggravating or Mitigating circumstances
[ ] 5K2.1 Death
[ ] 5K2.2 Physical Injury
[ ] 5K2.3 Extreme Psychological Injury
[ ] 5K2.4 Abduction or Unlawful Restraint

[ ] 5K2.5 Property Damage or Loss
[ ] 5K2.6 Weapons and Dangerous instruments
[ ] 5K2.7 Disruption of Government Function
[ ] 5K2.8 Extreme Conduct
[ ] 5K2.9 Criminal Purpose
[ ] 5K2.10 Victim's Conduct
[ ] 5K2.11 Lesser Harm
[ ] 5K2.12 Coercion and Duress
[ ] 5K2.13 Diminished Capacity
[ ] 5K2.14 Public Welfare
[ ] 5K2.16 Voluntary Disclosure of Offense
[ ] 5K2.17 High-capacity Semiautomatic Firearm
[ ] 5K2.18 Violent Street Gang
[ ] 5K2.20 Aberrant Behavior
[ ] 5K2.21 Dismissed and Uncharged Conduct
[ ] 5K2.22 Age or Health of Sex Offenders
[ ] 5K2.23 Discharged Terms of Imprisonment
[ ] Other guideline bases (e.g., 2B1.1 commentary)

D Explain the facts justifying the departure. (Use page 4 if necessary):

The Court determines that the sentence imposed under the Section IV and/or Section V is reasonable in light of the statutory factors set forth in 18 U.S.C. § 3553(a).

Additional Facts Justifying the sentence in this case (if applicable)

VI. COURT DETERMINATION FOR SENTENCE OUTSIDE THE ADVISORY GUIDELINE SYSTEM (Check all that apply)

A The sentence imposed is (Check only one)

[ ] below the advisory guideline range

[ ] above the advisory guideline range:

B Sentence imposed pursuant to (Check all that apply.):

1 Plea Agreement (Check all that apply and check reason(s) below.):

[ ] binding plea agreement for a sentence outside the advisory guideline system accepted by the court

[ ] plea agreement motion for a sentence outside the advisory guideline system, which the court finds to be reasonable

[ ] plea agreement that states that the government will not oppose a defense motion to the court to sentence outside the advisory guideline system

2 Motion Not Addressed in a Plea Agreement

[ ] government motion for a sentence outside of the advisory guideline system

[ ] defense motion for a sentence outside of the advisory guideline system to which the government did not object

[ ] defense motion for a sentence outside of the advisory guideline system to which the government objected

3 Other

[ ] Other than a plea agreement or motion by the parties for a sentence outside of the advisory guideline system (Check reason(s) below)

C Reason(s) for Sentence Outside the Advisory Guideline System (Check all that apply)

[ ] the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)

[ ] to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(1)(A).)

[ ] to afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(1)(B))

[ ] to protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(1)(c))

[ ] to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(1)(D))

[ ] to avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6))

[ ] to provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))

D Explain the facts justifying a sentence outside the advisory guideline system. (Use page 4 if necessary)

VII COURT DETERMINATION OF RESTITUTION

A [✓] Restitution Not Applicable.

B Total Amount of Restitution ___.

C Restitution not ordered (Check only one)

1 [ ] For the offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663(c)(3)(A)

2 [ ] For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663(c)(3)(B)

3 [ ] For offenses for which restitution is otherwise mandatory under 18

U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under, 18 U.S.C. § 3663(a)(1)(ii).

4 . [ ] Restitution is not ordered for other reasons. (Explain).

D [ ] Partial restitution is ordered for these reasons (18 U.S.C. § 3663(c))

VIII ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE (if applicable.)

JUNE 25, 2007
Date of Imposition of Judgment

/s/ Susan Oki Molloway
Signature of Judge

Susan Oki Molloway,
United States District Judge
Name and Title of Judge

6/29/07
Date Signed

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, vs. BASHO ELLIOT, Defendant.	CR 03-00244 SOM 01 Honolulu, Hawaii February 23, 2007 9:00 A.M. Various Motions

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SUSAN OKI MOLLWAY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: BEVERLY WEE SAME-SHIMA, ESQ.
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For the Defendant: JOSEPH T. VODNOY, ESQ.
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MICHAEL J. GREEN, ESQ.
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Honolulu, HI 96813

Official Court Reporter: Debra Kekuna Chun,
RPR, CRR
United States District Court
300 Ala Moana Blvd.
Ste. C285
Honolulu, HI 96850
(808) 534-0667

Proceedings recorded by machine shorthand, transcript produced with computer-aided transcription (CAT).

* * *

[34] THE COURT: Well, okay, I think I'm ready to rule on these motions.

So I'm ruling on the renewed government motion to exclude testimony of Frank Panessa first, and on that motion the ruling is unchanged from what it was the last time. And so just so we can get it all in one place, so to the extent it seeks to exclude rebuttal by Mr. Panessa of Mr. Lawson's expert testimony the motion is denied. To the extent it seeks to exclude Mr. Panessa's testimony about the alleged insufficiency of the government's investigation of Mr. Meston, the motion is granted.

How shall I do this? Okay. I'll ask the minutes to reflect this order relies on Richard Gordon's letter to the court, dated April 2, 2004. Items 1 and 2 in that

letter are allowed. Item 3 in the letter is not allowed, unless the government is allowed to respond with evidence of otherwise excluded statements by the defendant. Item 4 is not allowed, unless the defendant first presents an appropriate foundation. Item 5 is not allowed.

* * *

[36] THE COURT: Okay. So we'll about that later.

Okay. Number 5 is not allowed. Number 6, the first two sentences are not allowed, unless the government is given permission to respond by putting on evidence of otherwise excluded statements by the defendant. The last sentence of number 6 is allowed. That goes to the weight, not the admissibility of evidence.

Okay. Number 7, I'll give the same ruling I gave last time, which is it's allowed if a foundation is laid that Mr. Panessa has expertise in this area.

Number 8 is not allowed, unless the government is given permission to respond by presenting evidence of otherwise excluded statements by the defendant.

I think number 9 is withdrawn.

Number 10, this evidence is not allowed, unless the government is given permission to respond by presenting [37] evidence of otherwise excluded statements by the defendant.

Number 11 is allowed.

Okay. Now, with respect to the specific – that's for the government's motion. Okay.

Now, with respect to the defendant's motion concerning the use of evidence of defendant's statements, this motion is denied, except that I will allow the defendant to ask the single question, "Was Mr. Meston's house searched?"

MR. VODNOY: Well, as I understand it, the answer would be yes. I would just add one word, "thoroughly," because they're going to say, yes, they searched. So I'm just wondering was it thoroughly searched, and the answer would be no. I'm just looking for a "no" answer. So I think that would be the question I would ask.

THE COURT: You're changing the question on me now.

MR. VODNOY: I'm changing the question on you only because I was advised that – or they recall that there was a cursory search.

THE COURT: What if the answer is, "As thorough as was necessary under the circumstances."

MR. VODNOY: I have to live with it.

THE COURT: That's what I would think they're going to answer, you know.

MR. VODNOY: I just want to add the word "thoroughly."

[38] THE COURT: Okay. Go ahead. But I think – I mean I don't know what you're going to do with this answer.

MR. VODNOY: I'll do – whatever the answer is, I'll do the best I can with it.

THE COURT: Okay. But this question and the follow-up question about how – whether it was – the search was thorough may not be the basis of any indication to the jury that law enforcement procedures were violated. And I say that because there will be a lack of foundation for any such indication to the jury.

MR. VODNOY: That refers to the closing argument because Panessa – I'm going to track his testimony, which did not go into these matters.

THE COURT: Right. But I actually don't see the problem with spec – I mean I don't know how effective it's going to be, but I don't see why I should restrict – I don't think I can restrict them from saying who knows what would have been found had they done X, Y, and Z, but I don't think he can make – I mean, as much latitude as we give in closing argument, it's supposed to somehow be tied to the evidence at trial. And the argument that they should have done something would only be tied to evidence that I have precluded them from bringing without opening the door, and so I think I'm within my authority here to say that you cannot express that sentiment.

MR. VODNOY: I won't.

* * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, vs. BASHO ELLIOT, Defendant.	CR 03-00244 SOM 01 Honolulu, Hawaii March 2, 2007 9:00 A.M.

TRANSCRIPT OF JURY TRIAL (DAY 4)
BEFORE THE HONORABLE SUSAN OKI MOLLWAY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: BEVERLY WEE SAME-SHIMA, ESQ.
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RPR, CRR
United States District Court
300 Ala Moana Blvd.
Ste. C285
Honolulu, HI 96850
(808) 534-0667

Proceedings recorded by machine shorthand, transcript produced with computer-aided transcription (CAT).

* * *

[4-187] THE COURT: Okay, I'm going to go ahead and rule on [4-188] the motion to dismiss portion, and then we'll talk about the other portion.

I'll deny the motion to dismiss. As I understand it, the premise of the motion to dismiss is that there was government misconduct that should be punished by dismissing the government's case. Whoever is claiming misconduct of an opponent has the burden of establishing that such misconduct occurred, and that burden is not met by the defense. All the defense has is a report by defense counsel of a statement by a proposed defense witness that the witness himself will not confirm or verify.

I am by no means suggesting that defense counsel has made up the conversation. I have every reason to think that defense counsel was told what defense counsel has represented he was told by this witness. But that hardly satisfies the burden since defense

counsel, obviously, has no firsthand knowledge of the situation.

We do have Miss Sameshima's unequivocal denial that she did the thing she is accused of having done.

Now, you know, this case has been going through trial this whole week, and even before this trial began I had hearings with these attorneys, both of you, and so I've had a chance to gather an impression of both attorneys. And my impression of both attorneys is that they are operating ethically, honestly, forthrightly. I have no reason to think [4-189] that either one of you has committed an unethical act and certainly not the kind of act that Mr. Vargas has described.

Now, with respect to Miss Sameshima, of course, my exposure to her and the basis of my view of her integrity goes far beyond this case because she has appeared before me dozens and dozens of times. Off the top of my head I can think of a couple other trials she's been in. One was a civil forfeiture trial. One was a marijuana manufacturing trial. I think she appeared with her colleague Miss Sheehan in the Steven Brooks drug trial. Quite apart from all the nontrial proceedings she has appeared before me on. So, you know, I've never seen her do something that cause me to question her integrity, and the activities described by Mr. Vargas would be inconsistent with what I know about her and have observed about her myself.

So without more I find no basis for determining that there was government misconduct, and so I'm denying the motion, which is based on that allegation of misconduct. The motion to dismiss is denied.

* * *

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BASHO ELLIOT, aka Bosch Elliot, Defendant-Appellant.	No. 07-10328 D.C. No. CR-03-00244-SOM District of Hawaii, Honolulu ORDER (Filed Feb. 20, 2009)

Before: SCHROEDER, PAEZ and N.R. SMITH, Circuit Judges.

The panel denies the petition for panel rehearing and denies the petition for rehearing en banc. The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.